

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2006-173781-001 DT

05/09/2011

JUDGE DOUGLAS L. RAYES

CLERK OF THE COURT
H. O'Shaughnessy
Deputy

STATE OF ARIZONA

DIANE M MELOCHE

v.

JAMES E SPRINGER (001)

KENNETH S COUNTRYMAN

COURT ADMIN-CRIMINAL-PCR
JUDGE WARNER
VICTIM SERVICES DIV-CA-CCC

PCR RULING

This matter was taken under advisement after the evidentiary hearing of April 29, 2011 on Defendant's Petition for Post-Conviction Relief. The Court has considered Defendant's Petition, the State's Response, the Defendant's Reply, the evidence presented at the hearing, the Defendant's Supplement Information for the Court, the State's Response Thereto and the arguments of counsel. The State's Motion to Strike Defendant's Supplemental Information is denied.

After a trial to a jury the Defendant was convicted of one count of aggravated assault and was acquitted of the other count, first degree burglary. Defendant was sentenced to an aggravated term of 13 years. Defendant's conviction was upheld on appeal. Defendant brought this petition, claiming he is entitled to relief for among other reasons, that his trial attorney was ineffective. The Court found that Defendant's petition presented a colorable claim on the ineffective assistance claim and a hearing on that issue was held on April 29, 2011.

Defendant was charged with Aggravated Assault and Burglary in November, 2006. He has been in custody ever since. He was at first represented by the Maricopa County Public

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Defender's Office, but when a conflict developed, the Public Defender withdrew and contract attorney Brad Reinhart was assigned to defend Defendant.

Although Defendant was housed in the 4th Avenue jail in downtown Phoenix, Mr. Reinhart never went to see him. All of the communications between Defendant and Reinhart were either by phone where Defendant was in a day room with 30 other inmates with a 15 minute per call limitation or on the chain in the courtroom. Defendant requested Reinhart to come see him but Reinhart refused because going to the jail was not a good use of his time.

Defendant's prior attorney had an investigator working on the case. Mr. Reinhart did not. Mr. Reinhart performed no investigation. His trial prep relied on the information and discovery provided to him by the State and whatever information the previous attorney left in the file.

The Defendant's girlfriend was present at the time of the alleged offenses. Reinhart was told by Defendant that her testimony would be exculpatory. Reinhart felt that she could incriminate herself by talking to him so arranged for an attorney to be appointed for her. Defendant's girlfriend failed to show for at least one interview scheduled with Reinhart and the prosecutor before trial. Reinhart never interviewed her before trial. Reinhart and the prosecutor interviewed her during lunch on the second day of trial. Reinhart had no notes of the interview.

At trial, the State's only witness to the events of the alleged crime was the victim. Reinhart cross-examined the victim with the information supplied to him by Defendant's prior attorney and the State; the victim had a drug problem, prior felonies and used methamphetamine on the day of the offense.

The State rehabilitated the victim's credibility with the victim's testimony that he was being successful on probation and off drugs for 6 months. The victim testified on direct examination:

Q: How are you doing on probation?

A: Great.

Q: And you're drug testing?

A: Yes.

Q: And you're sober?

A: Yes. Six months.

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Q: Six months. Congratulations.

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From that point forward the victim's successful 6 month drug rehabilitation was an accepted fact throughout the trial. On cross-examination Mr. Reinhart congratulated him on his 6 month sobriety:

Q: You said you're six months sober.

A: Yes.

Q: And again, I congratulate you as well.

A: Thank you.

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In the State's closing argument the victim's six month sobriety was again used to bolster his credibility. The State argued:

"He had a lot of problems...He's been addicted to drugs...He told you he's been sober now six months. He's trying to turn over a new leaf."

RT August 1, 2007 P. 64 L. 6 – 11

In Defendant's closing Mr. Reinhart again conceded the victim's success in drug rehabilitation:

"You saw a clean version of that guy. You saw a guy cleaned-up for six months on probation and has to keep clean. That is who you saw."

RT August 1, 2007 P. 72 L. 22 – 24

The truth was that the victim was neither successful on probation nor clean for six months. Seven months before trial the victim was arrested on a new offense and was in custody until May 4, 2007, when he was released on probation. In July 2007, less than one month before he testified about his 6 month sobriety, the victim failed to drug test and admitted to his probation officer that he had again used methamphetamine. The victim's probation officer filed

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with the Court in the victim's criminal case, a report reflecting the victim's admission. The probation officer's report is a public record available to anyone who reviewed the victim's court file. Mr. Reinhart failed to review the victim's court file or to interview the victim's probation officer.

A claim of ineffective assistance of counsel involves a two-prong test. Defendant must first show that his counsel's representation fell below an objective standard of reasonableness and secondly that counsel's failure resulted in prejudice to the Defendant. To demonstrate prejudice, the Defendant must show by a "reasonable probability that but-for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Mata*, 185 Ariz. 319, 331, 916 P.2d 1035, 1047 (1996).

In applying the first prong of the two prong test for ineffective assistance of counsel,

THE COURT FINDS that Mr. Reinhart fell below an objective standard of reasonableness in the following ways:

- 1) Failure to meet with, interview and discuss the case with the Defendant. Phone calls in the day room for 15 minutes and 5 minute conversations while the Defendant is on the chain as the only means of communication is inadequate.
- 2) Failure to interview a key witness before trial, Defendant's girlfriend was the only witness to the events, other than the Defendant and the victim.

Mr. Reinhart had no notes in his file to explain what happened. The witness claims she was available and the Court finds it incredible that a willing and friendly witness, even with counsel, could not have been interviewed by Defendant's counsel before trial. Despite his testimony that he did not decide whether to call her until after he interviewed her, Mr. Reinhart made reference to her testimony in his opening statement:

"You're also going to hear from a witness, not James, another witness say that Eugene went to reach for a gun or what looked like a gun and that's when he was hit."

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He knew she was a key witness and promised the jury that they would hear from a witness, not the Defendant and not the victim. The only other witness was the girlfriend.

- 3) Failure to investigate the victim. Mr. Reinhart did not feel a need to investigate the victim because he felt he had plenty of information for an effective cross examination. It is not reasonable to fail to investigate the State's key witness, even when

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some impeachment information has been provided. The fact that the victim had recent criminal charges and convictions had a history of drug abuse and was on probation made an investigation even more necessary.

The second prong of ineffective assistance of counsel PCR claim is the but-for prong. As to failures 1 and 2 above, the Defendant has not met his burden. Defendant has not shown how the outcome of the trial would have been different had Mr. Reinhart properly met with him or had interviewed the Defendant's girlfriend before trial. Mr. Reinhart interviewed her in the middle of the trial and despite his promise to the jury, testified that he made a strategy decision not to call the girlfriend. Although he had no notes, his memory was that her testimony somehow would have helped the State and not the Defendant. The Court cannot say that decision was inappropriate.

As to the failure to investigate the victim,

THE COURT FINDS that there is a very reasonable probability that the outcome would have been different if Mr. Reinhart had been armed with the true facts of the victim's last six months; incarceration until 2 months before trial, and admitted meth use less than a month before trial. The victim's alleged six month drug recovery was critical to his trial credibility. The victim's credibility was critical to the case against the Defendant. With proper investigation, the victim's "new and clean ways for the past 6 months" would have been shown to be a lie and his credibility would have been destroyed.

IT IS ORDERED granting the Petition for Post-Conviction Relief.

IT IS ORDERED setting aside the guilty verdict found at trial by a jury and the sentence imposed.

IT IS ORDERED reinstating the Defendant's plea of not guilty and the charge of Aggravated Assault is reinstated.

IT IS FURTHER ORDERED assigning this matter to Judge Randall Warner and setting it for Status Conference on May 27, 2011 at 8:30 a.m.

NEW LAST DAY: August 7, 2011.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>. Attorneys are encouraged to review Supreme Court Administrative Orders 2010-117 and 2011-10 to determine their mandatory participation in eFiling through AZTurboCourt.